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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 487

NATIONAL BANK OF WASHINGTON and FRED A. SMITH & CO., *Petitioners*,

v.

GERTRUDE McGETTIGAN, Individually and as mother and next friend of CHARLES S. McGETTIGAN, a minor, *Respondents*.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPPOSITION TO WRIT OF CERTIORARI.

Respondents pray that this Honorable Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case, entered on May 16, 1963.

CITATIONS TO OPINIONS BELOW

The opinions of the District Court, the Circuit Court of Appeals, and the Supplemental Opinion of the Circuit Court of Appeals, as well as the Order Denying Petition for Rehearing en banc, are all printed in Appendix A of the Petition for Writ of Certiorari. In order to avoid duplication, these Opinions and Orders are not reprinted in this Opposition Brief, and references herein relate to Appendix A of the Petition for Writ. On June 24, 1963, respondents' counsel submitted to the Clerk of the Court of Appeals a timely brief, in opposition to the Petition for Rehearing en banc. The Clerk subsequently informed counsel that the respondents' opposition brief to Motion for Rehearing en banc had not been filed, in view of an Order being entered denying the petition for rehearing. Therefore, although it has not been possible to certify respondents' Brief in Opposition to Petition for Rehearing en banc, copies have been lodged with the Clerk of the Supreme Court, should the Court desire to refer to same.

JURISDICTION

Respondent admits the jurisdiction of this Court and the chronology of opinions reversing the District Court and denying petition for rehearing en banc as set forth in petition for writ.

QUESTIONS PRESENTED

Respondents differ with petitioners' statement as to questions presented. The case at bar was summarily disposed of by the District Court on a Motion for Summary Judgment; whereby respondents were denied a trial on the merits. The Circuit Court, at the con-

mencement of its twelve page opinion, ruled that the petitioner here was not entitled to summary judgment. (Petitioner's Appendix A at p. 11a.) Therefore, it is respectfully urged that the first question is:

"1. Did the District Court err in finding that there were no material issues of fact, and that the defendants below were entitled to summary judgment as a matter of law and in granting summary judgment?

Respondent further believes that the questions as presented by respondent do not fully cover the factual pattern and the legal picture. The following are the additional questions presented:

2. Whether a claim for injury to a young child is properly brought under the doctrine of "attractive nuisance" where the record reveals that he is injured by an explosive flare extracted by his young brother from a junk-heap in a one story open building abandoned for many years, during which period of abandonment the building is openly and permissively occupied and used by delinquents, thieves, vagrants and small children attracted thereto and unaware of dangers in deposits and accumulations in said structure of large quantities of debris and junk, such abandonment, usage, occupancy and presence of junk insidiously attractive to children being known to the owner and agent, who permitted usage and condition to continue ingabated.

3. Whether a child has a right of action for injuries proximately resulting from violation by property owner and agent of Housing Regulations promulgated for the purpose of preserving public health, safety, welfare, and morals, where such injuries are caused by an explosive flare extracted by his young brother

from an accumulation of junk and debris in an open brick outbuilding which, outbuilding had been abandoned for many years, during which time it was openly and permissively occupied and used by delinquents, thieves, vagrants and small children with the accompanying depositing and accumulation of large quantities of debris and junk including the explosive flare, all with knowledge of owner and agent, who did nothing to correct the situation in any regard.

4. Does a child have a right of action for injuries resulting from violation by property owner and agent of Act of Congress declaring the existence on private property of accumulations of debris affecting public health, safety, comfort and welfare to be a public nuisance dangerous to life and limb, where such injuries are caused by the factual situation set forth in Question No. 3 above, which constitute a nuisance under the statute.

5. Whether under the doctrine of attractive nuisance, the possessor of land and his agent, who permit and are aware of the maintenance of an artificial condition thereon, which constitutes an attraction and insidiously dangerous condition to children who are known to frequent the same, which danger is not apparent to the children, and who take no reasonable precautions for the protection of the children, are liable for bodily harm caused by a dangerous instrumentality extracted from hazardous debris of long standing upon the land, the presence of which debris is known to possessor of land, who takes no action to inspect, detect or remove same.

6. Whether the regular, open and notorious usage an occupancy by children of an abandoned and neg-

lected open building, containing attractive, unhealthful and insidiously dangerously debris, refuse and junk, with the tolerance and implied acquiescence of the owners and agents, over many years, places such children in the status of licensees by invitation with the accompanying duty of reasonable care toward such children on the part of owners and agents; or otherwise gives rise to a cause of action on behalf of said young children, on a straightforward negligence basis.

COUNTER STATEMENT BY RESPONDENT

The cause of action at bar was instituted on June 9, 1958 in the District Court and terminated by summary judgment granted some three and one-half years later, on November 20, 1961, when trial was imminent. In the interim, the most intensive pretrial preparations by way of discovery had been fully accomplished, and the depositions of nine major witnesses, bearing on liability, had been taken and incorporated into the record, in addition to extensive interrogatories of both defendants. The case was pretried over a period of several sessions, culminating in a detailed pretrial statement which contained the highly conflicting factual positions of the parties, seven specific charges of negligence, the defenses and stipulations. (R. 198-211)

As a consequence, it was established that on March 4, 1956, Charles McGettigan, aged nine, sustained critical burn injuries which confined him to hospital care for more than sixteen months, during which he underwent heroic surgery and the most intense medical and nursing care. Though his life was saved, he sustained sixty to seventy per cent permanent partial disability. In addition, the severe damage and scarring to his body necessitates continuous medical care

during his lifetime and compels long periods of hospital care and surgery in the future, involving twenty to twenty-five anticipated major operative procedures. (R. 202-205)

The minor plaintiff below was burned by what has been described as an explosive flare. It was found by his brother, John McGettigan, aged eleven, on the preceding day while playing in a brick, one story building in the rear and forming a part of premises 2413 Penna Ave. N. W. (R. 39, 44) While playing, John extracted and retrieved a cylindrical tubular object located among the trash and junk in the building. (R. 41, 45) The cylinder was about 20 inches long, khaki in color, apparently with cardboard exterior and somewhat heavier than a baseball bat. (R. 12, 45, 46) The object had been observed on the floor in the brick structure since the summer of the previous year, but had not been disturbed, because it was believed to be a pipe. (R. 46 et seq.) The one story brick and glass structure where the flare was located was owned by the National Bank of Washington, as Trustee, since 1948, and managed by its rental agent, Fred Smith & Co. (R. 64) The one story building had at one time been occupied by several businesses, including a real estate office, television shop and print shop, but thereafter became vacant. The petitioners swore that they had no knowledge of who rented or occupied this one story building between October 1, 1948 and November 1, 1956, a period of approximately six years. There was a steady downward course of deterioration and abandonment. (R. 68 et seq.) The doors disappeared; the windows and glass brick were broken; the building was open day and night without restriction or control and was frequented, used and occupied by all types of derelict persons, including drunks and

bums, who gathered there, drinking whiskey and wine and sleeping on old mattresses. (R. 44, 57, 69 et seq.) Young children frequented and played in and on the building. (R. 57, 58, 78) The interior was full of every type of debris and broken glass and children were cut by it. (R. 70 et seq.) The roof had a hole in it, and a child had fallen through. (R. 28, 43)

A gang of young thieves occupied the structure as a clubhouse for a period of almost two years up until early 1955. (R. 107) The gang leader, testified on deposition that his group engaged in the practice of stealing flares from various sources. (R. 97 et seq.) Many complaints were made by neighbors about the condition of the structure. (R. 70, 77) Police notified the agent on numerous occasions to clean up and close up the premises, but without success. (R. 255, 257) The defendant agent admitted weekly inspections of the structure, and the presence of debris therein over a period of many months prior to the minor plaintiff's injury. (R. 128 et seq.)

After taking the object from the building, John used it as a bat, and took it to his nearby home. (R. 46) His mother, Gertrude McGettigan, a widow, placed the unidentified object outside the back door in a paper bag, on a small porch. (R. 11, 13) On the following day, Charles McGettigan, the minor plaintiff attempted to dismantle it, and removed from the cylinder what appeared to be sand. His mother directed him to sweep it up, and while she was in the house, a few minutes later there was a terrible explosion, and the boy became a human torch, enveloped in flame, other flames extending above the housetop. The explosion had occurred when Charles applied a match to the "sand" which he had swept onto a piece of wax paper. (R. 57)

Respondents opposed the Motion for Summary Judgment on numerous grounds, including the applicability of the doctrine of attractive nuisance; applicability of pertinent sections of the District of Columbia Housing Code, Health Regulations, Police Regulations and certain provisions of the Code of Laws with reference to public nuisances.

Respondents also argued that the District Court was precluded from granting summary judgment in light of the extensive conflict on issues of material fact, evident from the pretrial discovery proceedings and from the total record. Respondents further argued to the District Court that the utter abandonment of the one story structure to the most notorious and dissolute occupancy by vagrants, thieves and delinquents over a period of many years, with known and obvious attraction to and use of the premises by children of tender years, unaware of the insidious dangers to their health and lives bred by the derelict occupancy, the vast accumulations of debris deposited in consequence of such occupancy and permitted to remain in the structure, compelled submission of this action to a jury for trial under the applicable doctrines of law.

The District Court granted summary judgment to the defendants below, solely on the inapplicability of the doctrine of attractive nuisance. The District Court completely ignored without comment the alternative grounds of liability asserted by respondents, including the claimed violation of regulations and statute, as well as the liability of defendants below on a straightforward negligence basis, aside from the attractive nuisance theory.

Respondents appealed the entry of summary judgment and the case was argued at length before a divi-

sion of the Court of Appeals for the District of Columbia Circuit. Extensive briefs were filed by both sides and searching inquiry was made of all counsel on hearing. A unanimous reversal ensued in a twelve page opinion handed down on May 16, 1963. (Petitioners' Appendix A at 1a)

After an extensive review of the growth of the law on the subject of "attractive nuisance" doctrine, the Court of Appeals for the District of Columbia stated in its opinion:

> "The effect of the progressive application of the attractive nuisance doctrine has been, we think, to erase the line separating landowners and occupiers from other persons generally, when their acts or omissions create an unreasonable risk of harm to children of tender years." (Petitioners' Appendix A at 18a)

The Court further stated, after an extensive review of the facts:

> "The jury should be allowed to decide whether due care was in fact exercised, because reasonable men might differ as to what was required of defendants in the factual situation the jury could have found to exist." (Petitioners' Appendix A at 20a)

Petitioners thereafter filed a timely Petition for Rehearing en banc, consisting of a lengthy brief. The petition here filed for Writ of Certiorari contains a restatement of the major arguments urged below by petitioners in support of their Motion for Rehearing en banc. The petition was considered by eight judges of the U. S. Court of Appeals for the District of Columbia Circuit, six of whom joined in the denial

of the Motion for Rehearing. A supplemental opinion was filed by the division of the Court replying directly to specific arguments raised by the petitioners below in their Petition for Rehearing. In rejecting these additional contentions the court concluded its supplemental opinion by stating:

> "A landowner or occupier may know or be charged with notice of a condition on his premises which should reasonably lead him to take precautions against intruding children of tender years without specific, positive, and current knowledge of the particular thing, constituting a part of that condition, which afterwards causes injury. As an example, an unguarded and clogged pond or pool of generally shallow water may conceal a deep well, as in Coeur d'Alene Lumber Co. v. Thompson, 215 Fed. 8, 17-18 (9th Cir. 1914). And see 2 Harper & James on Torts 1458-59 (1956)." (Petitioners' Appendix A at 24a-25a)

The petition for writ of certiorari followed, and this opposition to petition was thereafter submitted.

REASONS FOR NOT GRANTING WRIT

1. This Court has established the policy of entrusting to the Court of the District of Columbia all matters relating to local law.

The principles of law involved in the case at bar are local in nature, are of local rather than national importance and fall within the grouping of matters which this Court has ordinarily declined to review.

Petitioners in their Motion for Rehearing en banc concede the local importance, rather than the national importance of the law enunciated by the Court of Appeals in this case, and respecting which they now

seek a writ. In support of their argument before the Court of Appeals urging rehearing en banc of what the petitioners described as new legal principles, petitioners stated:

> "This is especially so where, by reason of the local rather than national importance of the decision, subsequent review by the Supreme Court is unlikely." (See Petitioner for Rehearing P. 2 footnote).

Under the decisions of this Court matters of local importance will be entrusted to the local Courts. Thus, in the case of *Fisher* v. *U. S.*, 328 U.S. 463, 476, (1945) this Court declined to review a conviction involving capital crime, stating:

> "Matters relating to law enforcement in the District are entrusted to Courts in the District. *Our policy is not to interfere with the local rules of law which they fashion*, save in exceptional situations where egregious error has been committed." (Emphasis added.)

The foregoing statement of policy was thereafter quoted with approval in the case of *Griffin* v. *U. S.*, 336 U.S. 704, 718, (1948); in which this Court went on to apply the same rule to matters of evidentiary law:

> "... It has been settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law, to be determined—in the absence of specific Congressional legislation—by the highest appellate Court for the District."

Tested by the criteria enunciated by this Court in the *Fisher* case, supra, in view of the obvious local

rather than the national importance of the case at bar, it is respectfully submitted that the petition for writ of certiorari should on this ground alone be denied.

2. *No "egregious error" has been committed by the Court of Appeals for the District of Columbia, in its disposition of the case at bar, which would impel this Court to interfere with the local rules of law.*

In the *Fisher* case, supra, this Court has stated that only in exceptional circumstances involving "egregious" error on the subject of local law would this Court intervene. Webster's Dictionary, 1960 College Edition, defines the word "egregious" to mean: "Outstanding for undesirable qualities, remarkably bad, flagrant." It is respectfully urged that the law enunciated in the case at bar does not fall within that classification. In point of fact, the decision in the case at bar follows the rationale long ago established for the District of Columbia in the case of *Eastburn* v. *Levin*, 72 App. D.C. 190, 113 F. 2d 176. (1940)

Nor is the decision of the sitting division at odds with the trend of the general law in cases of this nature or with any earlier opinion of this Court. On the contrary, it carries forward the opinion by the Court of Appeals in the case of *Eastburn*, supra, as a fair, reasoned, and enlightened opinion, in keeping with the great body of law which has developed in the United States expanding and broadening the attractive nuisance doctrine as originally enunciated in Par. 339 of the Restatement of Law (2d) Torts in 1934. Further evidence of the progressive growth and expansion of this doctrine is reflected in the words of Dean William L. Prosser in a foreword to Draft No. 5 of the Restatement, dated April 8, 1960, in which he states:

Par. 339, as to trespassing children is revised throughout. *The over-all effect is to broaden the rule* originally stated in 1934, when the liability to children met with a great deal more opposition than it does today." (Emphasis supplied.)

Thus it is that eleven changes have been made in the wording of the 1960 redraft of the Restatement, all of which changes, without exception, are progressive in nature and designed to liberalize the scope and tenor of the attractive nuisance doctrine.

It is important to note that in its published decision and supplemental opinion the sitting division quotes from seven texts or reviews on the subject at hand, cites or considers twenty-six decisions from Courts throughout the United States and one provision of the District of Columbia Code of Laws. Having so reviewed the body of law involved in this case, the Court reached the unanimous conclusion that a consideration of the extensive record in the case at bar, in light of the advanced state of the law on the subject, compelled a finding that the granting of summary judgment was erroneous. The case was thus reversed and returned to the lower Court for trial. In its decision, the total trend of the law on the subject of injuries to children under the attractive nuisance doctrine was reviewed by the United States Court of Appeals for the District of Columbia and the growing judicial liberalization noted with clarity and fairness; full and fair consideration was given to the arguments advanced by the petitioners in their original brief, as well as in their brief in support of Motion for rehearing en banc.

3. *The identical arguments which the petitioners here present in support of their application for writ of cer-*

tiorari have been uniformly rejected by the United States Court of Appeals for the District of Columbia, both by the sitting division, unanimously, and by the entire Court on petition for rehearing.

The judgment by the Court of Appeals in the case at bar, was unanimous by the sitting Division. Of the eight judges who considered the lengthy and detailed brief submitted by petitioners in support of Motion for rehearing en banc, six concurred in denying the motion for rehearing. Every argument advanced by petitioners in their brief filed in this Court has heretofore been fully covered in oral argument, in original brief as appellee below, or in brief in support of motion for rehearing en banc. The points now presented before this Court were asserted in and thereafter rejected by the Court below. In addition to a denial of the request for rehearing en banc, the sitting division saw fit to answer certain of the petitioners' arguments submitted in support of their motion by filing a Supplemental Opinion, which rejected contentions advanced by petitioners on Motion for Rehearing, reaffirming and strengthening the earlier opinion of the Court of Appeals for the District of Columbia. (See Petitioner's Appendix A at p. 24a).

The petitioners have been afforded every measure of consideration and have taken every opportunity to urge, argue and brief their contentions in the Court below. The Court below is unmoved in its position that justice requires that respondents be granted a trial by jury. No case submitted by the petitioner supports a contrary view.

With respect to the contention of the petitioner that the case at bar is at odds with the decision of this

Court in *Best* v. *District of Columbia*, 291 U.S. 411 (1934), a careful reading of the *Best* case indicates that no such conclusion is justified. The controversy in the *Best* case supra, in the words of Chief Justice Holmes

> "turns largely upon a difference of view as to inferences to be drawn from the opening statement."

Justice Holmes went on thereafter to say in discussing the second point:

> "the question is one of negligence—whether particular circumstances gave rise to a duty which had not been performed"

Nothing in the decision at bar can be interpreted to conflict with the ruling in the *Best* case. On the contrary, the ruling of the Court below is strikingly in accord with the holding of this Court in the *Best* case, supra, when the Court below says:

> "The data before the trial court created an issue as to an unreasonable risk of harm towards the minor plaintiff, a child of the neighborhood, whose injury a jury might reasonably conclude might have been prevented by due care on the part of defendants." (Petitioner's Appendix A at p. 20a)

Nor has this Court in the past taken jurisdiction solely by virtue of the contention that a decision of the highest appellate Court for the District of Columbia is novel in its interpretation, a claim advanced in the case at bar. In the case of *Hilaffe* v. *Argonne Co., Inc.*, 87 U.S. App. D.C. 57, 183 F. 2d 811, (1949) this Court denied certiorari, (71 S. Ct. 80) despite the fact that the law enunciated by the Court of Appeals for the District of Columbia was contrary to the unanimous

authorities throughout the United States in upholding a wife's right to bring an action for loss of consortium in cases where the injury to her husband resulted from defendant's negligence, thereby setting up a total new concept in the field of tort law. See also *Griffin* v. *U. S.* supra, where this Court declined to disturb a rule of evidence inique to the District of Columbia alone.

The petitioner's argument before this Court that the injuries sustained by the minor plaintiff were not reasonably foreseeable nor proximately caused by petitioners' acts, are so obviously jury questions as to more readily support the reasons for denial of the requested writ rather than for the granting of the same.

The clarifying judgment of the Court below follows a well-travelled and broadened pathway in granting a trial to this grieviously injured child, a trial which is justified and reinforced by the facts as well as the law.

CONCLUSION

For the reasons set forth, it is respectfully urged that petition for writ of certiorari be denied.

Respectfully submitted,

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